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83 - 1583

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

DAVID E. GRAHAM,
DEFENDANT/PETITIONER

V.

UNITED STATES OF AMERICA,
PLAINTIFF/RESPONDENT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Martin J. Levitt
Attorneys for
Defendant/Petitioner
312 Vine Street
Chattanooga, TN. 37402
615/266-1211

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals for the Sixth Circuit err in holding that the successor judge in the district court properly passed on petitioner's motion for new trial, even though the only evidence linking petitioner with the crimes charged was the uncorroborated testimony of an alleged accomplice?

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RANDEL v. BETO,
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UNITED STATES v. SIMMS,
508 F.Supp. 1188, 1202
(W.D. La. 1980)

OTHER AUTHORITIES CITED:

18 U.S.C. Sec. 371

28 U.S.C. Sec. 1254(1)

18 U.S.C. Sec. 2113(a)

F.R.C.P. 33

Federal Practice and Procedure,
Criminal Sec. 533

Rule 25(b) Federal Rules of
Criminal Procedure

OPINION BELOW

The opinion of the Court of Appeals below (Appendix, infra, p. A-1 - A-3) was not reported. The opinion of the District Court below (Appendix, infra, p. B-1 - B-15) was not reported.

JURISDICTION

The judgment of the Court of Appeals below (Appendix, infra, p. A-1 - A-3) was entered on January 16, 1984. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

1. The Fifth Amendment to the United States Constitution, which provides, in pertinent part, as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime...be deprived of life, liberty, or property, or without due process of law..."

2. The statutes under which defendant petitioner was prosecuted, although nothing herein turns upon their terms, were 18 U.S.C.

Sec. 371 and 18 U.S.C. Sec. 2113(a), the pertinent provisivions of which are as follows:

> Sec. 371. Conspiracy to commit offense or to defraud United States
>
> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the oject of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."
>
> Sec. 2113. Bank robbery and incidental crimes
>
> "(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management or possession of, any bank, credit union, or any savings and loan assiciation...shall be fined not more than $5,000 or imprisoned not more than 20 years, or both."

3. Rule 25(b) of the Federal Rules of Criminal Procedure, which provides as follows:

> "If by reason of absence, death, sickness or other disability the Judge before whom the defendant has been tried is unable to perform the

duties to be performed by the court after a verdict or finding of guilt, any other judge regularly sitting in or assigned to the court may perform those duties; but if such judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial."

STATEMENT OF THE CASE

On September 9th, 1982, petitioner was convicted in the United States District Court for the Eastern District of Tennessee, Southern Division, the Honorable Frank W. Wilson presiding, of conspiracy under 18 U.S.C. Sec. 371 and bank robbery under 18 U.S.C. Sec. 2113(a), after a jury trial upon a plea of not guilty.

On September 16, 1982, counsel for petitioner filed motions for judgment of acquittal and for new trial, contending, inter alia, that the verdict was contrary to the weight of the evidence. Before the Court could act on these motions the trial judge died. Thereafter, a successor trial judge, the Honorable Robert L. Vining, Jr., was appointed to fill the temporary vacancy left by the death of Judge Wilson. On October 18, 1982, counsel for petitioner filed a supplemental motion for new trial pursuant to Rule 25(b) of the Federal Rules

of criminal procedure, contending that the successor trial judge was not competent to pass on his original motions for new trial and judgment of acquittal because the weight of the evidence against petitioner depended entirely on the credibility of a single government witness, an unindicted co-conspirator, whose uncorroborated testimony the successor judge had not been able to hear and observe.

On December 22, 1982, the successor district judge issued an Order and Memorandum overruling petitioner's motions for new trial and for judgment of acquittal, holding, inter alia, that said motions could be properly decided by a successor judge. (Appendix p. B-1 - B-15).

On December 30, 1982, the district court entered judgment against defendant/petitioner and sentenced him to concurrent terms of five years on the conspiracy count and ten years on the robbery count. On

January 4, 1983, counsel for petitioner filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit.

On January 16, 1984 the Court of Appeals entered an Opinion affirming the judgment of the District Court, holding, inter alia, that the successor judge properly passed on defendant/petitioner's motions for new trial and for acquittal. (Appendix p. A-1 - A-3).

On February 6, 1984, counsel for defendant/petititioner filed a motion for stay of mandate with the Court of Appeals pending the filing of a petition for writ of certiorari with this Court, which motion was granted on February 4, 1984.

ARGUMENT

Petitioner contends that in passing upon his motion for new trial without the benefit of hearing and observing the testimony of the only witness implicating petitioner in the crime, the credibility of such witness being a critical issue, the successor district court judge, and the Court of Appeals which sanctioned his action, so far departed from the accepted and usual course of judicial proceedings and so deprived petitioner of due process of law as to call for an exercise of this Court's power of supervision.

Rule 25(b) of the Federal Rules of Criminal Procedure clearly recognizes and contemplates that there are some functions after a verdict or finding of guilt has been made that a successor district court judge, who did not himself preside at the trial of a case, may not be competent to discharge. Petitioner submits that one such function is passing upon a motion for

new trial challenging the weight of the evidence, at least to the extent the weight of the evidence in the particular case depends entirely upon the credibility of witnesses whose testimony he did not have an opportunity to hear and observe.

In Randel v. Beto, 354 F.2d 496 (5th Cir. 1965), the court quoted with approval the following observation made in several Texas cases concerning the critical importance of a trial court's function in passing on a motion for new trial:

> "The discretion confided by the law to trial courts to grant new trials is almost the only protection to the citizen against illegal or oppressive verdicts of prejudiced, careless, or ignorant juries. The appellate court cannot always set aside a wrong verdict, but the trial court can. Where the evidence is conflicting, but there is sufficient, if credible, evidence to support the conviction, the appellate court must affirm the conviction, but this is not necessarily the rule with the trial court in passing upon a motion for new trial. The trial judge may pass upon the credibility of the witnesses in determining the motion, but this the appellate court cannot do. While the enforcement of the criminal

> law is absolutely demanded for the protection of private and public rights, the protection of the citizens from the effects of law illegally administered is equally demanded by every sentiment of justice and principle of law. The refusal of a trial judge to grant a new trial in a proper case cannot be fully corrected by appeal, and these considerations should have proper weight with trial judges in the exercise of their discretion upon motions for new trial." (citation ommitted).

354 F.2d at 502. Although the Randel case dealt with a habeas corpus petition challenging a state court conviction, and thus did not involve federal Rule 25(b), the court did hold that the defendant's right to due process of law was implicated when his motion for new trial was denied by a successor judge who had not presided throughout the trial of the case.

In passing upon a motion for new trial contending, as was the case here, that the verdict was against the weight of the evidence, the trial court is called upon to independantly weigh the evidance and to consider the credibility of witnesses in order to determine whether a miscarriage of

justice may have resulted. In doing so, the court sits as a "thirteenth juror," and if it finds that the verdict is contrary to the evidence or its weight, and that a miscarriage of justice has resulted, the court may set aside the verdict and grant a new trial. See, e.g., United States v. Simms, 508 F.Supp. 1188, 1202 (W.D. La. 1980); 2 Wright & Miller, Federal Practice and Procedure: Criminal Sec. 533; F.R.C.P. 33.

Petitioner submits that it is not realistically possible for a successor judge fairly and competently to perform the critically important function of passing upon a motion for new trial in a case where, as here, the only evidence supporting conviction is the uncorroborated testimony of a single, admitted accomplice.

This issue was confronted in Connelly v. United States, 249 F.2d 576 (8th Cir. 1957), cert. denied, 356 U.S. 921, 78 S.Ct. 700, 2 L.Ed.2d 716, reh. denied, 356 U.S. 964, 78 S.Ct. 991, 2 L.Ed.2d 1072 (1957). The

court observed as follows:

> "There might well be a criminal case in which the testimony would be of such a character that a successor judge could not fairly pass upon the questions here presented. If the evidence of the government were denied and the question of the credibility of the government witnesses was a serious issue, the conflict in the evidence and the question of the credibility of witnesses might be a matter of very serious consideration. However, in the instant case the evidence of the government was not of that character."

249 F.2d at 580. To be sure, credibility involves more than demeanor, but the importance of demeanor must be considered by a successor judge in making necessary credibility determinations in the particular case. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963).

In Connelly and Carbo, the courts concluded that careful review of the trial transcript by the successor judge sufficiently qualified him to pass on the defendant's motions for new trial. In Connelly, the court observed that credibility of government witnesses was not a serious issue, nor was

the government's proof contradicted, since the evidence circumstantially tended to prove only certain business transactions among alleged co-conspirators to which the defendants responded to by claiming lack of knowledge or offering innocent explanations. 249 F.2d at 480. In Carbo, the court found that the testimony of several government witnesses had been convincingly corroborated. 314 F.2d at 750.

In the present case, the proof implicating petitioner in the conspiracy and bank robbery was neither circumstantial and uncontradicted, as in Connelly, nor was it based on the corroborated testimony of several government witnesses, as in Carbo. Rather, it rested entirely on the testimony of one man, Mr. Eddie Houston, a convicted arsonist, fraud, and burglar, a suspect in other bank robberies, a professional government witness, and an admitted conspirator and accomplice in the crimes charged against petitioner. Despite the fact that he

allegedly procured petitioner to rob the bank, cased the bank, arranged for a getaway car, a getaway driver, a getaway route, and a "safe house," provided supplies to petitioner, drove him to the bank, and was to receive one-third of the proceeds, he was not indicted for his extensive participation. His testimony that it was petitioner who agreed to rob the bank and who actually entered the bank on the date in question was not corroborated by a single other witness; neither the police officer inside the bank nor any of the tellers and other persons in the bank who testified, nor any of the other participants in the crime, identified petitioner as the robber.

Houston's testimony that he was approached by another to assist in the robbery was contradicted by another government witness who testified that Houston himself hatched the plot and approached the other person for assistance. Further, Houston's

testimony that another government witness had arranged with the police officer inside the bank to assist in the robbery was contradicted by the testimony of that officer. Thus, the only evidence linking petitioner to the conspiracy and robbery was the testimony of a single witness, a lifelong felon and admitted accomplice who was given extraordinary consideration by the government in exchange for his testimony, whose identification of petitioner was not corroborated by a single other witness and whose testimony was contradicted in several important respects by other witnesses for both the government and the defense.

Houston's identification of petitioner as the man who entered and robbed the bank cannot be buttressed in its credibility by its "consistency" either with other testimony by the same witness or with the other evidence, since there was no other testimony or evidence implicating petitioner for it to be "consistent" with. The identification

itself stood alone and unsupported. Its weight as evidence depended entirely on the personal credibility which the jury and the original trial judge accorded the one witness from whom it came. The conclusion is inescapable that that witness' demeanor and the overall impression he made on the persons who actually saw and heard him testify must have been decisive. Under these circumstances, a successor judge, who did not himself see or hear this witness testify, cannot have been competent fairly to weigh the only evidence implicating petitioner or to access the credibility of its source, in passing on petitioner's motion for new trial. His action in nevertheless doing so was an abuse of discretion and denied petitioner due process of law.

CONCLUSION

Petitioner respectfully contends that the action of the successor district court judge in passing upon and denying his motion for new trial, and the decision of the Court of Appeals sustaining such action, so denied petitioner due process of law and so far departed from the accepted and usual course of judicial proceedings under the circumstances as to call for an exercise of this court's power of supervision. Accordingly, petitioner prays that a writ of certiorari issue to the Court of Appeals for the Sixth Circuit and that, upon hearing of this cause, the decision of the Court of Appeals be reversed and the case remanded to the district court for a new trial.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of this pleading has been served upon all parties at interest in this case or counsel for said parties by delivering a true and exact copy of said pleading to the offices of said counsel or by placing a true and exact copy of said pleading in the United States Mail addressed to the parties or to said counsel at his or her office, with sufficient postage thereupon to carry the same to its destination.

This 15 day of March 19 84

By Martuff Furth

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 15 DAY OF MARCH, 1984.

Carolyn Hoglin Camp

NOTARY PUBLIC

MY COMMISSION EXPIRES: 3/30/84

APPENDIX

FILED
JANUARY 16, 1984
JOHN O. HEHMAN, CLERK

NO. 83-5011

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

V. ORDER

DAVID E. GRAHAM,

Defendant-Appellee.

Before: LIVELY and ENGEL, Circuit Judges; and CELEBREZZE, Senior Circuit Judge.

David E. Graham was convicted of bank robbery and conspiracy to commit bank robbery under 18 U.S.C. Sec. 2113(a) and (2) and 18 U.S.C. Sec. 371. At trial, the primary evidence linking Graham to the robbery was the identification testimony of co-conspirator Eddie Houston. None of the other conspirators or witnesses to the robbery was able to make a positive identification. The trial judge died after the trial but before sentencing. Therefore,

Graham was sentenced by another judge to five years on the conspiracy count and ten years on the robbery count. Graham appeals challenging the sufficiency of the evidence, the adequacy of the jury instructions, the admissibility of Houston's testimony, and the ability of the successor judge to pass on his motion for a new trial.

While Graham's sentencing and motion for a new trial had to be undertaken by another judge following the untimely death of the trial judge, the record clearly shows that the successor judge carefully and conscientiously reviewed the trial records and available information on a basis for determining an appropriate sentence. We agree with the successor judge's conclusion that he was able fairly to pass upon the motion for new trial and to sentence Graham although he had not himself presided at the trial. See Carbo v. United States 314 F.2d 718 (9th Cir. 1963); Connelly v. United States, 249 F2d 576 (8th Cir. 1957), cert. denied,

356 U.S. 921 (1958). We find no abuse in his exercise of discretion in this regard nor any other prejudice to Graham by the untimely death of the trial judge. Finally, we find no merit in any of the other grounds asserted for reversal of the judgment of conviction and sentence. Accordingly,

The judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF
THE COURT

S/B John O. Hehman
-Clerk-

ATTEST:

A true copy.
Certified this January 18, 1984.
Karl D. Saulpaw, Jr.,
BY: Cyndee Holder, Deputy Clerk

FILED
DECEMBER 22, 1982
Karl D. Saulpaw, Jr., Clerk
BY: Mary Hartman, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE,
SOUTHERN DIVISION

UNITED STATES OF AMERICA)

VS.) CIV-1-82-36

DAVID E. GRAHAM)

ORDER

Defendant DAVID E. GRAHAM was found guilty of violating the Federal Criminal Conspiracy Statute, 18 U.S.C. Sec. 371, and committing a bank robbery in violation of 18 U.S.C. Sec. 2113(a) by verdict of a 12-person jury upon September 9, 1982. The case is presently before the Court upon defendant Graham's motion for a new trial (Court File #23) and due to the unfortunate death of Judge Frank W. Wilson who tried this action, the Court has carefully examined the record and transcript and concluded that defendant's motion may be properly decided by a successor judge.

Having considered defendant's motion, and in accordance with the accompanying memorandum, it is hereby ORDERED that defendant GRAHAM'S motion for a new trial be denied; and further ORDERED that David E. Graham appear before this Court upon December 30, 1982, at 9:00 A.M. o'clock for sentencing hearing and judgment.

ENTER:

S/B Robert L. Vining, Jr.
United States District Judge

ATTEST:
A True Copy.
Certified this December 22, 1982
Karl D. Saulpaw, Jr., Clerk
by: Mary Hartman, Deputy Clerk

FILED
December 22, 1982
Karl D. Saulpaw, Jr., Clerk
by: Mary Hartman, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

UNITED STATES OF AMERICA)

VS.) CR-1-82-36

DAVID E. GRAHAM)

MEMORANDUM

After a two-day trial concluding upon September 9th, 1982, defendant, DAVID E. GRAHAM was found guilty of violating the Federal Criminal Conspiracy Statute, 18 U.S.C. Sec. 371, and committing bank robbery in violation of 18 U.S.C. Sec. 2113(a). Graham filed a motion for a new trial (Court File #23) and prior to a ruling upon that motion, the judge who tried this case, the Honorable Frank W. Wilson, passed away.

F.R.Crim.P. 25(b) provides:

"...If by reason of absence, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt,

> any other judge regularly sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial."

Defendant Graham contends that a successor judge may not adequately pass upon the grounds raised in his motion for a new trial (Court File #35) while the government contends a successor judge may properly address the issues raised. The Court has carefully reviewed the record and transcript of this case in light of defendant's motion for a new trial and concludes that there is essentially no problem of conflicting evidence, and the only problematical issue raised is the credibility of the government's informant, Eddie Houston, who was an unindicted co-conspirator of the defendant. As the Court does not believe that the defendant has raised a serious issue as to Eddie Houston's credibility, Carbo v. United States, 314 F2d 718 (9th Cir. 1963), the motion appears

suitable for decision by a successor judge.

Turning now to defendant's Rule 33 motion for a new trial and the five specific points raised therein: (1) that the verdict is contrary to the weight of the evidence; (2) that the verdict is not supported by substantial evidence; (3) that the defendant was prejudiced by witness Eddie Houston's perjury; (4) that the Court failed to reinstruct the jury about using caution in weighing an accomplice's testimony; and (5) that the conviction was based upon the uncorroborated testimony of an accomplice, Eddie Houston. A review of the transcript reveals the following evidence:

Two American National Bank employees testified that they were working in the Northside Branch on the morning of August 7, 1979 and at about 9:15 the robber entered. They described him as a white male between 5'11" and 6'1", weighing about 180 pounds with dark hair that had gray streaks in it and a fake moustache. His hair was shiny

or wet. The bank guard, Melvin Carson, described the robber as being 6'2" to 6'3", weighing 180-190 pounds with dark wet hair that had gray streaks and a fake moustache. Carson said it looked as if the robber had cotton pads in this mouth to fill out his cheeks and that his nose and eyes looked similar to Graham's. All of these witnesses noticed the robber was made up but none was able to identify Graham as the robber.

The testimony of Carson and the two bank employees was that the robber came into the bank and looked around for a minute or two and then went to Carson and told him it was a hold-up and he wanted the money the Purolator armored truck had delivered that morning. Carson went over and got Elizabeth Poynton, acting branch manager, asked her to step to the back with him and told her it was a robbery and to give the man some money. The robber explained that he had a gun and a radio controlled explosive device which was a box with an antenna. Mrs.

Poynton told the robber the Purolator money was in the vault and she did not have a key, but that the tellers did have some cash. Officer Carson then got head teller Janet Myers to put some money in a bag for the robber and she slipped in a few bills and a dye bomb. After Carson gave the money to the robber, the robber tried to grab Carson's gun as he went out of the bank. Carson resisted and after the robber broke free, Carson fired two shots. These witnesses also identified bank pictures showing the robber but could not identify Graham as being that man.

FBI Agent Don Halfpenney testified that after he arrived at the scene, he searched behind the bank and found a bank deposit bag and metal box with antenna. Further on he found two flashlights and a can of insect repellant in a sewer under the Market Street Bridge and he followed the sewer to an opening near the Nautilus Fitness Center. Agent Halfpenney interviewed

people in the area and William Wimpy, a security guard at Pro-Group, Inc., told him that while he was on duty that morning, a black car with Tennessee license #4,A5021 came speeding from the Market Street Bridge and nearly hit him. Following up this lead, Agent Halfpenney found Ed Pullom, a black male, at his residence with the above black car. As the FBI was looking for a white male robber, this lead was not followed further and the case was closed until Eddie Houston came forward with his information.

Eddie Houston testified as a government witness, in return for being named as an unindicted co-conspirator, that he had been approached by JoJo Scott who said he had inside help in the Northside Branch of American National Bank to perform a bank robbery. Houston then said he met with defendant Graham several times and Graham showed Houston his intended getaway through the sewer pipe and told him where to have the car parked for the getaway. Graham also said he needed a place to wash and change after the robbery.

Houston then testified he got Ed Pullom to drive and showed him where to park the morning of the robbery and how to drive to JoJo Scott's house where Graham was to change and wash up. Ed Pullom testified that Houston told him where to pick the robber up and how to drive to a house he identified as that of JoJo Scott. Pullom said the robber looked peculiar with he came out of the sewer and smelled bad. The robber said the money had "damn dye" in it and later Pullom found purple powder on the back floorboard of his car.

Eddie Houston testified that he went to JoJo Scott's house after the robbery and Graham had just finished showering when he arrived. The house smelled bad and Graham showed him the money bag which had exploded. Graham's old clothes and the money bag were pushed under the bed and a few days later returned and threw these items in Chickamauga Creek. Houston said nobody got any money. Houston also

identified the robber in the bank pictures as the defendant Graham.

Edwina Scott testified that JoJo, her husband told her to leave the house the day of the robbery because they were going to try to rob the bank. When she got home that day, she said that the house had a terrible odor.

Melvin Carson, the policeman at the bank, was the only defense witness and his testimony was favorable to the defense only insofar as it contradicted Houston's testimony that JoJo Scott had arranged with a police officer at the bank to assist in the robbery. Defense counsel did point out that Houston may have perjured himself as a government witness in the earlier case of U.S.A. v. Shasteen and Orr, CR-1-8-29, when he was asked if he had ever been involved in a bank robbery and he answered, "No." When defense counsel pointed out that Houston's conduct in this case amounted to aiding and abetting thus constituting the offense

of bank robbery, Houston explained that he was ignorant of the law and that by his answer in the ealier case he only meant that he had never walked into a bank and robbed it.

From this review of the testimony, it is clear that the defendant's contentions that the verdict is contrary to the weight of the evidence and that the verdict is not supported by substantial evidence must fail. The evidence was uncontradicted that defendant Graham committed the bank robbery, though the government's case turns largely on the testimony of Eddie Houston to identify Graham as the robber. This is not the exceptional case in which there is evidence preponderating heavily against the verdict. United States v. Sinclair, 438 F.2d 50, 51, n. 1 (5th Cir. 1971).

Defendant contends that he was prejudiced by Houston's "perjury", but any perjury occurred in a different case and Houston explained his answer in that other case sufficiently to prevent the Court from

concluding that he actually perjured himself. His explanation is that he misunderstood the law of aiding and abetting, which does not appear unreasonable. No prejudice to the defendant is apparent from Houston's testimony in another case, and the government certainly cannot be said to have countenanced false testimony in this case. Defendant also points to several points where Houston's testimony does not mesh exactly with corroborating witnesses' recollections. The minor inconsistencies mentioned by the defendant are not unusual in trials of events three years old and do not incline the Court to set aside the jury verdict. In any event, Houston's identification testimony was supported by the general descriptions given by the bank employees, and the jury was allowed to examine the bank camera photographs which may have further bolstered Houston's testimony, even though Graham could not be positively identified from those pictures.

Defendant contends that the Court erred in failing to reinstruct the jury upon the caution to be used in weighing the testimony of an accomplice. The Court did give such an instruction in its initial charge and the jury retired to deliberate at approximately 2:00 p.m. upon September 9, 1982. At 3:26 p.m. the jury returned and requested that they be re-instructed upon the subject or phrase "beyond a reasonable doubt". After giving such a supplemental instruction, the Court allowed the jury to retire and inquired of counsel, "Anything further in connection with the supplemental instructions to the jury?" To which defense counsel replied, "No, Sir." At 5:18 p.m. the jury returned a verdict of guilty on both counts. The cautionary instructions given in the initial charge was adequate under United States v. McCallie, 554 F2d 770 (6th Cir. 1977) and in the absence of any objection; F.R.Crim.P. 30 precludes the assignment of error to such an commission.

Finally, defendant contends that his conviction should not be allowed to stand as it is based solely upon the testimony of an accomplice. A conviction is valid even if supported only by accomplice testimony so long as a properly cautioned jury accepted such testimony as proof beyond a reasonable doubt. United States v. McCallie, 554 F.2d 770,772 (6th Cir. 1977). The protections offered against false accomplice testimony, those of cross-examination and proper cautionary instructions, were availed of by the defendant and the jury was twice charged upon reasonable doubt. Nonetheless, a guilty verdict was returned by the jury after slightly more than three hours' deliberation. In light of Sixth Circuit decisions, the Court does not believe this argument to be meritorious. Accordingly, an order will enter denying defendant's motion for a new trial and setting the case for sentencing.

ROBERT L. VINING, JR.
United States District Judge

FILED
JANUARY 4, 1983
Karl D. Saulpaw, Jr., Clerk
by: Mary Hartman, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

UNITED STATES OF AMERICA)

VS.) CR-1-82-36

DAVID E. GRAHAM)

NOTICE OF APPEAL

Notice is hereby given that DAVID E. GRAHAM, defendant named above, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the Final Judgment entered in this action on the 30th day of December, 1982.

This 4th day of January, 1983.

Respectfully submitted,

Phillips, Clements, Levitt & Young
BY: Leroy Phillips, Jr.
Attorneys for Defendant

ATTEST:
A true copy
Certified this January 5, 1983.
Karl D. Saulpaw, Jr., Clerk
by: Mary Hartman, Deputy Clerk

CERTIFICATION OF FILING AND SERVICE

OF NOTICE OF APPEAL

I, Leroy Phillips, Jr., Attorney At Law, hereby certify that the attached notice of appeal was filed with the Clerk of the United States District Court for the Eastern District of Tennessee, Southern Division, on the below noted date and a copy of the notice of appeal was served upon the United States Attorney's office located in the Federal Building, Chattanooga, Tennessee, at the same time.

This 4th day of January, 1983.

Phillips, Clements, Levitt & Young
BY: Leroy Phillips, Jr.
Attorney for Defendant
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